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DIVISION OF
OIL GAS & MINING

Attorneys for Castle Valley
Special Service District

IN AND BEFORE THE UTAH STATE DIVISION
OF OIL, GAS, AND MINING

In the Matter of the Potential
Pattern of Violations and
Related Issues, Co-Op Mining
Company, Bear Canyon Mine,
Emery County, Utah,
ACT/015/025

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:
:
: Brief of Castle Valley
: Special Service District
: Concerning Issues to be
: Considered at December 18,
: 1992, Hearing

Castle Valley Special Service District ("Castle Valley"), by
and through its counsel, Appel & Mattsson, hereby submits this
Brief concerning issues to be considered at the December 18, 1992,
hearing.

BACKGROUND

1. On December 7, 1992, Castle Valley filed a Petition to
Intervene in the above-referenced matter in order to protect its
water sources from the mining operations and practices of Co-Op.

2. On December 18, 1992, a hearing is set before the DOGM.
Briefs for the hearing are due on December 10, 1992.

3. In order to meet the December 10, 1992, deadline, it was necessary for Castle Valley to file this Brief before a formal decision had been made on its Petition to Intervene.

INTRODUCTION

1. On July 27, 1992, Dianne R. Nielson, Director of the DOGM, signed Findings, Conclusion and Order concerning Co-Op. (A copy of these Findings are attached as Exhibits "A" and incorporated herein by reference).

2. Ms. Nielson concluded that NOV's N91-35-1-1, N91-20-1-1 and N91-26-7-2(#2) had been identified by the DOGM as constituting a potential pattern of violations. (Exhibit "A" at p. 2, ¶2).

3. Ms. Nielson further found that:

NOV's N91-35-1-1, N91-20-1-1 and N91-26-7-2(#2) have been determined to have occurred. The fact of the violation was not appealed in N91-35-1-1 and N91-26-7-2(#2). The fact of violation was appealed in N91-20-1-1, the fact of the violation was upheld in an informal conference, and the informal order was not appealed.

(Exhibit "A" at p. 2, ¶3).

4. On October 28, 1992, an Order to Show Cause Hearing was held before the DOGM concerning Co-Op's Potential Pattern of Violations.

5. At that hearing it was determined that another hearing must be held on December 18, 1992, to consider the issues of whether Co-Op's existing NOV's and assessments on which its pattern of violations were based are res judicata as to: 1) the fact that the violation occurred and as to 2) the degree of negligence or fault of Co-Op. (See November 9, 1992, Notice of Hearing at p. 1).

ARGUMENT

I.

Co-Op's Previous Mining Law Violations Should be Considered Res Judicata and Should Not be Revisited

Co-Op's existing NOV's and assessments on which the pattern of violations are based should be considered res judicata as to the fact that the violations occurred and the degree of negligence or fault of Co-Op. There are at least three violations which the DOGM believes constitute a pattern--N91-35-1-1, N91-20-1-1 and N91-26-7-2(#2). (DOGM July 27, 1992, Findings at p. 2, ¶2). Co-Op did not appeal N91-35-1-1 and N91-26-7-2(#2), but did appeal N91-20-1-1. At the informal conference requested by Co-Op concerning N91-20-1-1, the DOGM upheld the violation. Co-Op did not appeal the informal order. (DOGM July 27, 1992, Findings at p. 2, ¶3).

Co-Op is now claiming that the DOGM should be required to make a second determination that these violations occurred before it can be proven that Co-Op engaged in a pattern of violations. Castle Valley believes that this is contrary to Utah's Mining Rules and Administrative Process and to Co-Op's past actions and representations.

A. Co-Op Has Already Been Given the Opportunity to Contest the Underlying NOV's and Should be Precluded from Revisiting Them

Utah's Mining Rules and Administrative Process provide procedures whereby a mining company such as Co-Op can appeal any

notice of violation, citation, cessation order or assessment¹. Co-Op is well aware of its rights to appeal DOGM decisions and has availed itself of this process on several occasions. Co-Op appealed N91-20-1-1, while electing not to appeal NOVs N91-35-1-1 and N91-26-7-2(#2).

Furthermore, Co-Op has informally discussed these and other Notices of Violations and Assessments with DOGM personnel on many occasions. The files kept by the DOGM on Co-Op contain numerous letters between Co-Op personnel and engineers with DOGM personnel concerning such matters. Now, long after the NOVs were issued, Co-Op is attempting to contest the validity of the underlying NOVs and assessments. The DOGM cannot allow this. To do so would gut the entire administrative process.

Under the parallel doctrines of administrative finality and res judicata, Co-Op is not entitled to a reconsideration of the validity of the underlying NOVs or assessments. As the court said in Wilford Niece v. OSM, 433 ALJ 2995 (October 27, 1986), the doctrines of res judicata and collateral estoppel bar petitioner from contesting the facts of the violations set forth in the underlying NOV, from disputing that the permittee failed and refused to comply with the orders of the Secretary and from disputing that petitioner willfully and knowingly failed to comply. Id. at 2997.

¹ See e.g., R645-400-320 et seq., R645-400-332 et seq., R645-400-350 et seq., R645-400-360 et seq., R645-400-380 et seq., R645-401-700 et seq., R645-401-800 et seq., R645-401-900 et seq., R645-402-500.

Similarly in Gem Mining Company, Inc. v. OSM, 584 ALJ 4054 (November 18, 1988), the court held that an unappealed NOV becomes final and may not be reconsidered. Id. at 4055. In Melvin Helit v. Gold Fields Mining Corp., 113 IBLA 299 (March 12, 1990), the court held that ". . . when a party has had an opportunity to obtain review within the Department and no appeal was taken, or an appeal was taken and the decision was affirmed, the decision may not be reconsidered in later proceedings except upon a showing of compelling legal or equitable reason, such as violations of basic rights of the parties or the need to prevent an injustice." (citations omitted). Id. at 114. The court found no exception in that case and there would be no grounds for an exception in the instant case. Co-Op's NOVs N91-35-1-1, N91-20-1-1 and N91-26-7-2(#2) are final and not subject to reconsideration. These NOVs and related assessments prove that the violations occurred and prove Co-Op's level of fault or negligence.

**B. Co-Op Should be Estopped from Contesting
the Validity of the NOVs and Assessments
Underlying its Pattern of Violations Citation**

Co-Op should be estopped from contesting the validity of the NOVs and assessments underlying its pattern of violations citation. Co-Op has had extensive interaction with the DOGM concerning NOVs N91-35-1-1, N91-20-1-1 and N91-26-7-2(#2) and associated assessments. In one instance Co-Op appealed the issuance of the NOV. In the other two instances it made no appeal. Co-Op objected to these NOVs at the time they were issued, but eventually paid the assessment fines. Given its actions, Co-Op should be estopped from


contesting the underlying NOV's which occurred years ago. It would be unfair to allow Co-Op to reargue the validity of NOV's and assessments that were extensively considered at the time the events occurred. The passage of time has not made the process easier. The previous decisions will be much more reliable than any made today.

Utah's Administrative rules are liberal in providing an appeal process to contest any actions of the DOGM. With one exception, Co-Op did not elect to avail itself of this process in a timely manner and should therefore be precluded from re-addressing those issues.

The only appropriate matter before this body is whether NOV's N91-35-1-1, N91-20-1-1 and N91-26-7-2(#2) and associated assessments and related NOV's constitute a "pattern of violations", not whether these violations and negligence have occurred. That determination has already been made and Co-Op has conceded the point by paying assessment fees.

WHEREFORE, Petitioner requests that the DOGM determine that Co-Op's past Notices of Violations and assessments are res judicata as to the fact that these violations occurred and as to Co-Op's level of fault and negligence. Co-Op must not be allowed to revisit these underlying violations.

Respectfully submitted this 10th day of December, 1992.


Jeffrey W. Appel
Michele Mattsson
Attorneys for Petitioner

CERTIFICATE OF HAND-DELIVERY

I hereby certify that on the 10th day of December, 1992, true and correct copies of the foregoing Brief of Castle Valley was hand-delivered to the following:

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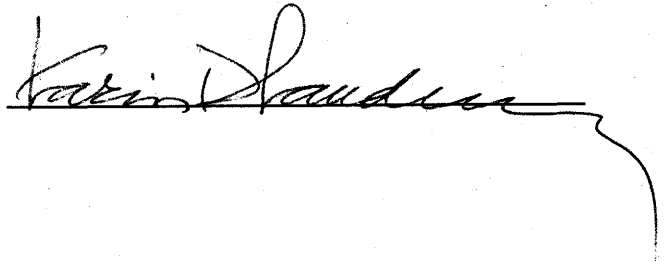
A handwritten signature in dark ink, appearing to read "Kevin D. Anderson", with a long, sweeping horizontal line extending to the right.

EXHIBIT "A"

BEFORE THE DIVISION OF OIL GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

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IN THE MATTER OF THE POTENTIAL :
PATTERN OF VIOLATIONS, INCLUDING
NOTICES OF VIOLATION N91-35-1-1, :
N91-20-1-1, AND N91-26-7-2(#2),
CO-OP MINING COMPANY, BEAR :
CANYON MINE, ACT/015/025, EMERY :
COUNTY, UTAH :

FINDINGS, CONCLUSIONS
AND ORDER

INFORMAL HEARING
CAUSE NO. ACT/015/025

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On July 8, 1992, the Division of Oil, Gas and Mining ("Division") held an informal hearing concerning the potential pattern of violations represented by the above-referenced Notices of Violation ("NOV"s). The informal hearing was held at the request of the operator/permittee Co-op Mining Company ("Co-op") and in accordance with Utah Admin. R645-400-332 and the Division policy ("Policy") entitled Procedure For Determination of Pattern Of Violations, Utah Code Ann. Section 40-10, as revised April 28, 1992. The purpose of the hearing is to provide an opportunity for Co-op to prove to the Division that the above-referenced NOV's were not caused by Co-op willfully or through unwarranted failure to comply. The following individuals attended the informal conference:

Presiding:

Dianne R. Nielson, Director
Division of Oil, Gas and Mining

Petitioner:
("Co-op")

Carl Kingston, Esq.
Counsel for Co-op Mining Company

Wendell Owen
Resident Agent
Co-op Mining Company

Eldon Kingston
Co-op Mining Company

Kimly Mangum
Mangum Engineering
Consultant to Co-op Mining Company

Division:

Lowell Braxton
Associate Director for Mining

Pamela Grubaugh-Littig
Permit Supervisor

Thomas A. Mitchell, Esq.
Assistant Attorney General
State of Utah
Counsel for the Division

Board:

Joe Helfrich
Assessment Officer

The Findings, Conclusions, and Order in this matter are based on information provided in connection with this informal hearing and information in the files of the Division.

FINDINGS OF FACT

1. Notice of this hearing was properly given.
2. NOVs N91-35-1-1, N91-20-1-1, and N91-26-7-2(#2) have been identified by the Division as constituting a potential pattern of violations, in accordance with Utah Admin. R645-400-332 and the Policy.
3. NOVs N91-35-1-1, N91-20-1-1, and N91-26-7-2(#2) have been determined to have occurred. The fact of violation was not appealed in N91-35-1-1 and N91-26-7-2(#2). The fact of violation was appealed in N91-20-1-1, the fact of violation was upheld in an informal conference, and the informal order was not appealed.

4. In its consideration of whether the violations were caused willfully or through unwarranted failure to comply, the Division also reviewed other violations at the Bear Canyon Mine, including N91-26-7-2(#1), N91-35-8-1, N90-35-1-1, N90-25-1-1, and N91-26-4-3(31).

5. N91-35-1-1 was issued on February 27, 1991, based on an inspection conducted on February 22, 1991, for failure to conduct mining and reclamation activities in accordance with the approved plan, failure to include a detailed description of each road constructed, used or maintained within the permit area, and failure to remove topsoil from the area to be disturbed, in violation of Utah Admin. R614(645)-301-534.100 through 130, R614(645)-301-527.100, R614(645)-301-527.200 through 210, 230, and 240, R614(645)-301-232.100, and Utah Code Ann. 40-10-18(j). The unauthorized construction consisted of a road which was bladed from the top of the upper road (near upper pad) to the coal shoot where a hoist was installed.

6. With respect to N91-35-1-1, Wendell Owen stated that he gave Co-op employee Kevin Peterson specific directions as to how the coal was to be removed from around the coal shoot. According to Mr. Owen, the violation occurred because the employee did not follow Mr. Owen's directions.

7. The final assessment of NOV N91-35-1-1 included the assignment of 23 points for negligence. On a scale of 0-30 points, the range of 16-30 negligence points represents a greater degree of fault.

8. NOV N91-20-1-1 was written on April 26, 1991, for failure to operate in accordance and compliance with the terms and conditions of the permit, all applicable performance standards and requirements of the State Program, specifically for failure to submit all maps and information required by the Division Order issued November 27, 1990, items 8, 14, 17, and 18. Provisions violated were Utah Admin. R614(645)-300-143 and R614(645)-303-212. The determination of insufficiency of the maps which prompted the Division Order, was based on field inspections and review of plan maps and information. Because the violation was written for failure to comply with the Division order and by its nature did not require substantiation through a field inspection, an inspection was not conducted prior to issuance of the violation.

9. With respect to N91-20-1-1, Co-op believes that they attempted in good faith to redo the maps required in the Division Order. Co-op did not know that the Division would require new maps until the Division Order was written. Co-op anticipated that it would take 6-8 months to redo the maps. The Division originally required that the maps be submitted in 90 days. That deadline was extended to March 27, 1991, a period of approximately 4.5 months.

When the consultant who usually does Co-op's maps was unable to do the work, Co-op hired two other consulting groups to redo the maps. Co-op requested an additional extension, but the request was not timely made.

10. The final assessment of NOV N91-20-1-1 included the assignment of 20 points for negligence. On a scale of 0-30 points,

the range of 16-30 negligence points represents a greater degree of fault.

11. NOV N91-26-7-2(#2) was written on July 2, 1991, based on an inspection on July 1, 1991, for failure to obtain Division approval before enlarging the shop pad, in violation of Utah Admin. R614(645)-300-143.

12. With respect to N91-26-7-2(#2), Co-op stated that the objective was to clean out a pond. The material from the pond had previously been taken to another pad area. However, when the pond was enlarged, Co-op's plan did not designate where the material was to be taken. The material was used to enlarge a pad which had not been designated to receive the material. Wendell Owen was responsible for the work, but was not there when the work occurred.

13. The final assessment of NOV N91-26-7-2(#2) included the assignment of 25 points for negligence. On a scale of 0-30 points, the range of 16-30 negligence points represents a greater degree of fault.

CONCLUSIONS OF LAW

1. The occurrence of NOVs N91-35-1-1, N91-20-1-1, and N91-26-7-2(#2) constituted a potential pattern of three same or similar violations, as provided in Utah Admin. R645-400-332 and the Policy, thereby causing the opportunity for this informal hearing.

2. The presumption, in evaluating whether the

violations were caused by the permittee willfully or through unwarranted failure to comply, assumes that a person intends the probable and logical consequences of his actions. As provided in Utah Admin. R645-400-331, a finding of unwarranted failure to comply will be based upon a demonstration of greater than ordinary negligence on the part of the permittee. No evidence has been provided which rebuts this presumption.

3. The Director has reviewed the history of these three violations, N91-35-1-1, N91-20-1-1, and N91-26-7-2(#2), as required by Utah Admin. R645-400-332.300 and the Policy.

4. The violations in N91-35-1-1 and N91-26-7-2 were directly related to the willful and unwarranted failure of Co-op management to sufficiently supervise employees to ensure that the work was properly conducted in accordance with the approved plan. In both NOV's, the permittee was determined to have demonstrated greater than ordinary negligence.

5. NOV N91-20-1-1 was caused by Co-op's failure to meet a deadline for submission of maps and information. Failure of the permittee to diligently complete an abatement is not justification for extension of the abatement time, as delineated in Utah Admin. R645-400-324. However, there is reason to believe that the failure to timely abatement may have been caused by factors in addition to negligence or lack of diligence. In consideration of the work to be done and Co-op's efforts to complete that work, the nature of the response does not constitute a willful or unwarranted failure to comply.

6. The Director has considered the existence of a pattern of violations based on two or more Division inspections, as required by Utah Admin. R645-400-332.100 and the Policy.

7. NOVs N91-35-1-1 and N91-26-7-2(#2) constitute a pattern of violations caused by willful and unwarranted failure to comply, as defined by Utah Admin. R645-400-332.

ORDER


1. NOVs N91-35-1-1 and N91-26-7-2(#2) constitute a pattern of violations caused by willful failure to comply, as defined by Utah Admin. R645-400-332.100.

2. By this order, Co-op is notified of the Division's determination of a pattern of violations.

3. The Division hereby determines and recommends to the Board that an Order To Show Cause be issued pursuant to Utah Admin. R645-400-331, said Order To Show Cause to include a recommendation for a 48-hour suspension of mining operations.

4. Co-op has the right to an appeal of this Informal Order. That appeal is provided through the above-referenced Order to Show Cause. The Board will notify Co-op regarding the date of the formal hearing to consider the Order To Show Cause.

SO DETERMINED AND ORDERED this 27th day of July, 1992.


Dianne R. Nielson, Director
Division of Oil, Gas and Mining
State of Utah